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NO. 75-483

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

BERENTJE C. M. POHLMAN.
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, replying to the mamorandum of opposition to her petition for a writ of certiorari on file herein, answers, to-wit:

AS TO OPPOSITION ARGUMENT NO. 1 (Page 3)

This petitioner never alleged that her returns were timoly filed. It was her defense and it remains her contention that although her omissions were negligent and careless, she did not possess the criminal intentto violate the provisions of 26 U.S.C. 7203.

It is petitioner's contention that to be adjudged guilty of "willfullness" as used in 26 U.S.C. 7203, the accused must be proven to have been possessed of a specific state of mind to violate the law at the time of the alleged omissions. To proveand substantiate such mental state, the prosecution should be required to produce evidence of overt acts, statements and conduct of the accused during the years such alleged acts occurred.

The government keeps insisting that there was ample evidence that petitioner acted willfully in this case, yet they fail to set forth any specific acts of the accused to substantiate this claim. The record in this case clearly demonstrates that petitioner had been selected for prosecution in one form or another.

FIRST: They attempted to prove wrongdoing by petitioner as related to

Her employer withholding and social security tax returns. The facts are that the IRS agents were attempting to add to petitioner's annual gross income the earnings of the two women associated with the petitioner in the conduct of a tax return service. By construing the earnings of these women as wages, adding these sums to petitioner's annual gross earnings, the petitioner would be in a position whereby there would have been an understatement of annual gross income of more than twenty five percent. Next, they proceeded to have billings sent to petitioner for the amount of tax shown on her returns, with interest added, but without penalty. When the billings were received by petitioner, she attempted to elicit from the agents whether this was an offer of IRS to settle the matter. The agents would not discuss the matter with petitioner, and

had petitioner been naive enough to take the bait offered, the IRS would have set the stage to bring felony charges against this petitioner. The facts were that there was nothing questionable about petitioner's handling of these returns, and the record discloses that Agent Bogan decided they could not bring charges on the employer returns and they decided to concentrate on petitioner's individual tax matters.

Notwithstanding a ruthless investigation into this petitioner's professional and personal affairs, the IRS was unable to elicit any fraudulent, legally questionable activities, or any concealed income or assets. The records substantiate that petitioner's report of gross income was substantially the same as the investigation of her affairs uncovered. Having nothing to conceal, this petitioner had given these agents

full cooperation. The intensive investigation into the petitioner's affairs revealed that petitioner did not live in any extravagant manner, from time to time was required to borrow money to survive, and that she had assumed necessary family obligations not within her means.

What really transpired in petitioner's case was a deliberate and planned campaign by the IRS to discredit this petitioner, and notwithstanding anything this petitioner attempted or would have revealed, she was the target of government persecution. No stone was left unturned in this investigation, yet the government was unable to produce any witnesses against this petitioner to substantiate that she deliberately and without justification disobeyed the law. By use of the media of press and television, the prosecution gave this case sufficient pre-trial publicity whereby petitioner could

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not have prevailed under any circumstances.

Considerable emphasis has been placed by the government on the fact that petitioner was required to borrow money. The funds borrowed by petitioner were necessary for her survival, and as hereinafter set forth, explainable.

AS TO OPPOSITION ARGUMENT NO. 2 (Pages 3 and 4)

The Circuit Court En banc agreed that a clarification of these instructions are necessary. The panel stated:

> "However, it must be recognized that clarity and unambiguity are the hallmarks of a good jury instruction. In the light of the similarity in language between the two concepts discussed above we think it would be preferable that future instructions on willfulness not embody the language of "without justifiable excuse." We would suggest that the first paragraph of the instruction given by the trial court herein be modified to provide that:
>
> Willfulness is an essential element of the crime of failure to file an income tax return. The

> word "willfully" used in connection with this offense means voluntary, intentional violation of a known legal duty, or otherwise stated, with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the facts material to, the determination of her tax liability."*1

In the case at hand petitioner's failure to file timely returns might well have been without legal justification, but could well have been and was, with justifiable excuse. The fact that petitioner has to exist in a small rural community which expects her to be at its beck and command at all hours, the fact that petittoner served in public office during times when that office required all of her free time, and the fact that petitioner was financially unable, and remains financially unable to carry the

*1 - APPENDIX B-Petitioner's Writ, Page 5

tax burden imposed arbitrarily upon her by reason of her marital status, may well have been a justifiable excuse.

AS TO OPPOSITION ARGUMENT NO. 3 (Page 5)

Agent Engelemann did not come to petitioner's office for the purpose of mere audit. He came for the explicit purpose of obtaining evidence of some alleged criminal acitivity on the part of petitioner. He first requested the petitioner to supply him with a listing of her clients, and that certainly is a most unusual audit procedure. He then proceeded to conduct a senseless audit of petitioner's tax clients. His conduct prior to making inquiry of petitioner relative to her personal returns was such that any further dealings with him by petitioner were with her knowledge that she was under suspicion of serious wrongdoings.

The agents admitted that Agent Englemann was the person primarily interested in proving a case against this petitioner. He tried every unpleasant trick (sometimes referred to as "dirty tricks") to entrap this petitioner into the commission of a felony. Petitioner was able to elicit from these men while they were under cross-examination sufficient admissions that their conduct in the investigation was open to serious question, and in fact, there is sufficient evidence in this record to subject these agents to prosecution. Petitioner asks why the Justice Department has not proceeded with action in that respect. By reason of the fact that petitioner was being subject to criminal investigation prior to the entry of the agent at her office, she was entitled to her constitutional warnings at the initial meeting. It was not Special Agent Bogan who conducted this investigation

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but Agent Englemann clothed in the disguise of an auditor. The public is well aware that IRS promotes only its most unscrupulous employees, and Agent Englemann appears to be an ambitious man.

AS TO OPPOSITION ARGUMENT NO. 4 (Page 5)

The returns handed to the IRS agent by petitioner in October of 1972 were handwritten work sheets that had been prepared by petitioner's assistants in April of 1971. The fact of the preparation of these returns exists in sworn written statements obtained by the agents from these women during the course of this investigation. Petitioner would point out to the Justice Department that these agents lied in a federal courtroom relative to these facts. Inquiry may now be made of petitioner why she did not bring out this fact at her trial. The answer is simple, in that petitioner has great respect for the character and

reputations of these two fine women. Under no circumstances would petitioner subject either of them to the unethical and ruthless abuse of a U. S. Attorney.

The fact that petitioner did not have the money on hand to honor the check she wrote in April of 1971 for payment of the taxes is not open to great suspicion.

Petitioner's banker testified that he would have made her a loan for the amount of the check if the same had appeared for bank clearing. Again, Petitioner points to the total lack of character and integrity of the agents who handled this investigation. They were well aware that the tax returns had been prepared by petitioner's assistants in 1971, yet Mr. Englemann gave false testimony when he stated that petitioner had said she would prepare the returns and have them ready for him at a later date. He had requested a copy of

petitioner's 1971 return at the initial meeting. Anyone who had the fundamental knowledge of a self-employed business person's tax returns would know that it was not possible for petitioner to have given Englemann a completed 1971 tax return had she not completed preparation of prior returns.

The documents handed to Englemann in October of 1972 were merely the working papers of petitioner's original returns. The trial court was in error in failing to give considerations to petitioner's objection as relates to the use of the best evidence rule.

AS TO OPPOSITION ARGUMENT NO. 5 (Page 6)

The government has at its disposal in prosecuting the hapless public unlimited financial means to transport and produce its witnesses. Under the conditions which petitioner discussed with the U.S.

Attorney the contents of her conversations with the St. Paul Regional Office, the advantages were that of the prosecution.

Without defendant being afforded the opportunity of cross examination and confrontation, the U. S. Attorney was given opportunity to distort, misconstrue and take out of context the subject matter of defendant's conference with the Regional Office. His use of these hearsay statements in the prosecution's jury summation was highly prejudicial to the defendant, Plain Error, violative of the hearsay rules of evidence and defendant's rights of confrontation.

That petitioner did not reveal to the St Paul Regional office that she had filed the tax returns long prior to the agent's coming to her office is easily explained. This petitioner has little confidence in any of

the personnel of the IRS, and she acquired no greater satisfaction from her visit to St. Paul. Simply stated, had St. Paul returned the file to Fargo upon being advised that defendant had in all likelihood filed her returns, you can rest assured that IRS in Fargo would have started another purge.

In summation, petitioner respectfully submits that we see in this case only the top of the iceberg.This petitioner may not present the picture of affluency that her profession, which in the eyes of a money worshipping society,should have produced. However, this petitioner sleeps very well, for what she has earned in her practtce is honest money, upon which many demands are made, including a prejudicial tax structure that penalizes petitioner by reason of her marital status. Despite

the efforts of a ruthless Internal Revenue Service team to destroy the reputation and livelihood of this petitioner, petitioner has retained the respect and patronage of her community and clientele. The reason for that respect and loyalty is simply that this petitioner refuses to use friends, family and business associates for her personal gain. This petitioner took the chance of going into court against the IRS without using the people who could have given very favorable impressions as to petitioner's character and financial stresses. The IRS and the U.S. prosecutors can play the game with the attitude that the American public is the enemy of the bureaucrats, and if one has the will to resist, then ruin her. This petitioner prefers to follow the course she followed and has survived.

Respectfully Submitted,

January 2, 1976

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